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Supreme Court, U.S.
FILED
JUL 10 2009
OFFICE OF THE CLERK

No. 08-1298

In the Supreme Court of the United States

Mark Krueger,

Petitioner,

v.

State of Minnesota,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner respectfully petitions the Court for rehearing, or reconsideration, of the Petition For Writ Of Certiorari, which was denied by the Court on June 15, 2009, for the following reasons:

STATE COURTS ARE NOT PROPERLY COMPLYING WITH THE MANDATES OF BLAKELY AND CUNNINGHAM

Petitioner may not have adequately set forth the manner in which Minnesota Courts, and other state Courts are failing to fully comply with the decisions of this Court in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004) and Cunningham v. California, 549 U.S. 270 (2007), and are avoiding the mandates of these decisions.

THE BASIC RULE

In Minnesota, as well as many other states, the basic rule is that a Defendant's conduct must be substantially more serious than that typically involved in the commission of the offense in question before there can be an upward departure in sentencing. State v. Best, 449 N.W.2d 426, 427, (Minn. 1989); State v. cook, 351 N.W.2d 355 (Minn.App. 1984); State v Cowen, 87 Wash.App. 45, 55, 939 P.2d 1247, 1254.

It is not enough that something be called an "aggravating factor" and found by a jury to exist. Under Minnesota, and most state laws, a defendant's conduct must be a significantly more serious than that typically found in similar types of cases, which is as much a jury fact question as any "aggravating factor".

Even the Court of Appeals in this case acknowledged that:

> Generally in determining whether to depart durationally, the District Court must determine whether the Defendant's conduct was "significantly more serious than typically involved in the commission of the offense."

citing State v Best, id. Appendix Page A-5.

HOW THE COURTS ARE FAILING TO COMPLY

The courts are submitting simple, so called "aggravating factors" to juries for finding, but are refusing to allow juries to decide the basic question of whether or not a defendant's conduct was significantly more serious than that typically involved in the commission of the crime in question.

In Cunningham, at Page 8, the Supreme Court stated:

> This Court has repeatedly held that, under the Sixth Amendment, **any** fact that exposes a Defendant to a greater potential sentence **must be found by a jury, not a Judge**, and established beyond a reasonable doubt, not merely by a preponderance of the evidence. (Emphasis added)

It is respectfully submitted that this would include **any** material fact, not just an "aggravating factor, but **any** fact, and would certainly include the basic question of whether the Defendant's conduct was significantly more serious than that typically involved in the commission of the crime in question.

RULINGS BY THE MINNESOTA COURTS

The Minnesota Court of Appeals is still saying that the District Court must determine whether the Defendant's conduct was significantly more serious than that typically involved. Under the Sixth Amendment, as this Court set forth in Blakely and Cunningham, a Defendant is entitled to have a jury determine the fact question of whether or not his or her conduct was significantly more serious than that typically involved in the commission of the offense in question, particularly when that issue is timely raised by the defendant.

What the District Court did in this case was take a simple act that was very easy to prove and call it an "aggravating factor".

The act that the Court chose, was whether or not there was more than one form of penetration. The video clearly showed oral and digital penetration. The jury answered that question in the affirmative.

The District Court then imposed an upward departure of 12 years making a total sentence of 24 years for Count I.

The problem with this, is that the "more than one" form of penetration in this case, was not substantially more serious than that typically involved in the commission of the offense in question.

The District Court did not even make that finding, let alone, allow it to be made by a jury, even after repeated demands by Petitioner that this question be submitted to the jury. Appendix Pages A-30 to A-35.

The Court of Appeals held that "the District Court must determine". Appendix, A-5

At Appendix Page A-8, the Court of Appeals dismissed Petitioner's argument that a jury not a

District Judge must make the finding that a Defendant's conduct is significantly more serious than that typically involved in the commission of the crime in question, by citing two cases where the Minnesota Supreme Court affirmed upward departure when juries found aggravating factors without determining that the conduct underlying the offense was significantly more serious than that involved in the typical commission of a typical offense. The Court cited State v Rodriguez, 754 N.W.2d 672 (Minn. 2008), and State v Chauvin, 723 N.W.2d 20 (Minn. 2006), however these cases are not in point.

In Rodriguez, the case focused primarily on whether or not the Defendant had a right to confront witnesses against him, and whether the rules of evidence applied in a sentencing hearing.

In Rodriguez, the aggravating factor involved a major controlled substance offense and the criteria is specifically set forth in the list of aggravating factors as set forth in sentencing guidelines 2b(5). Appendix Page A-21.

Whether or not the conduct found as an aggravating factor was more serious than that typically involved in the commission of the offense in question was neither raised nor addressed in Rodriguez.

In Chauvin, the case centered around whether the District Court had authority to empanel a sentencing jury following Blakely, but before the legislature authorized it, and whether or not the aggravating factor of particularly vulnerable had to be in the complaint. The vulnerability factor is specifically listed in the sentencing guidelines in 2b(1). Appendix Page A-20.

Again, the issue of whether or not Defendants conduct was significantly more serious than that typically involved in the commission of similar crimes, was neither raised nor addressed in the case.

The decisions of the District Court, and the Court of Appeals in our case were wrong, and deprived Petitioner of his right to have that basic fact determined by a jury.

In a more recent case, State v. Adell, 755 N.W.2d 767, 774, (Minn.App. 2008), Judge Schellhas, which is the same Judge that wrote the opinion in our case, made the same incorrect ruling.

In Adell, the appellant also argued that multiple forms of penetration is not a valid aggravating factor because it is typical of the offense with which he was convicted.

The Court of Appeals acknowledged that:

> A court must justify a departure with "substantial and compelling circumstances" which are "those circumstances that make the facts of a particular case different from a typical case".

citing Taylor v. State, 670 N.W.2d 584, 587 (Minn. 2003).

The Court of Appeals then concludes:

> Thus, **we conclude** that multiple forms of penetration is not "typical" of the offense charged here and was properly considered by the district court to enhance appellant's sentence. (Emphasis added)

Here again, the Court, and not a jury, decided the fact of whether defendant's conduct was substantially more serious than that typically involved in the offense in question.

There are other unpublished Minnesota cases where the Courts have made the same ruling.

As Petitioner has previously pointed out, multiple forms of penetration is not listed as an aggravating factor in the sentencing guidelines. Appendix Pages A-19 to A-22.

Petitioner would further argue that digital penetration is involved in virtually every criminal sexual conduct case, and is therefore conduct that is typically involved in the commission of the offense in question. This would be especially true in cases involving 609.342 Subd. 1(g), which is where the actor had a significant relationship to the complainant. **That**, however, is the question that the jury must decide under our Constitution.

RULINGS BY THE COURTS IN THE STATE OF KANSAS

The case of State v. Bryant, 40 Kan.App.2d 308, 315, 191 P.3d 350, 356 (2008) involved a situation similar to this case.

In Bryant, which was a case involving securities fraud, the District Court took the simple fact of whether or not there was a fiduciary relationship between the defendant and the victim, called it an "aggravating factor", and submitted it to a jury.

When the jury found that there was a fiduciary relationship, the Court imposed a sentence which was an upward departure.

The Kansas Court of Appeals reversed, holding that a fiduciary relationship is typically present in securities fraud cases.

Unlike the Minnesota Courts, the Kansas Court of Appeals reached the correct result, but the point is, that the Court should have submitted the

question of whether or not defendant's conduct was substantially more serious than that typically involved in the offense in question to the sentencing jury in the first instance.

RULINGS BY THE COURTS IN THE STATE OF OREGON

Conversely, the Oregon Court of Appeals made the correct holding in the case of State v Howe, 198 Or.App. 568, 109, P.3d, 391, 392, (2005):

> The State argues that the claim of error asserted here is not apparent on the face of the record because (1) evidence at trial concerning the value of the property burned by defendant was uncontradicted, and (2) whether harm is greater than typical for an offense is a question of law for the court rather than a question of fact to be decided by jury.
>
> As to the state's first argument, it is beside the point whether evidence at trial **could have** supported a jury determination of a fact used to enhance a sentence; under the Sixth Amendment, a defendant is entitled to have the jury actually make such a determination. As to the second argument, we reject the state's suggestion that a determination that a crime caused harm "greater than typical" is not a factual finding. **Although an experienced judge might be especially competent to assess what is "greater than typical" harm from certain criminal conduct, such a determination is, nonetheless, a factual finding. Thus, to the extent that such a finding is used to enhance a sentence**

beyond what otherwise would be the statutory maximum, a defendant is entitled to a jury determination of that fact, based on evidence presented by the parties.

Finally, because the state has no valid interest in requiring defendant to serve an unconstitutional sentence, see Perez, 196 Or.App. at 373, 102 P.3d 705, we exercise our discretion under Ailes to reach the unpreserved error. Accordingly, we remand for resentencing. Sentence vacated; remanded for resentencing; otherwise affirmed". (Some emphasis added)

In the present case, the State also argued incorrectly in its brief that the question of whether or not Defendant's conduct was more serious than that involved in a typical case is a question of law, and the Court of Appeals appears to have adopted that position. Appendix Page A-5, A-8.

CONCLUSION

Except for State v Howe, id, the cases cited above are examples of the many cases being decided, where the Courts only submit selected fact questions to sentencing juries, but are refusing to allow a jury to decide the basic question of whether or not a Defendant's conduct was substantially more serious than that typically involved in the commission of the offence in question.

The heart of the issue may well be: is the question of whether or not a Defendant's conduct was substantially more serious than that typically involved in the commission of the crime or offence in question, a question of law, or a question of fact.

If it is a question of fact, defendants are entitled to have it decided by a jury. If it is a question of law, defendants may not be entitled to have it decided by a jury.

This is a very important question, and requires the direction of this court in order to bring the lower Courts into full compliance with this Court's decisions in Blakely and Cunningham.

Respectfully submitted,

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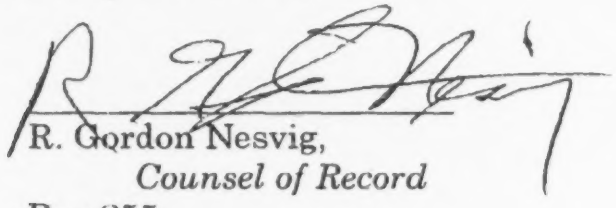
CERTIFICATE REGARDING PETITION FOR REHEARING

R. Gordon Nesvig, as counsel for Petitioner, hereby certifies that the Petition for Rehearing in this matter is limited to substantial grounds not previously presented, and is filed in good faith and is not for the purposes of delay.

Respectfully submitted,



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